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HOUSE BILL 645

**47TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2005**

INTRODUCED BY

Daniel R. Foley

AN ACT

RELATING TO STATE RULES; REQUIRING THAT RULES ADOPTED BY THE ENVIRONMENTAL IMPROVEMENT BOARD, THE WATER QUALITY CONTROL COMMISSION AND THE OIL CONSERVATION COMMISSION BE SUPPORTED BY CERTAIN SCIENTIFIC EVIDENCE; PROVIDING STANDARDS OF REVIEW IN APPEALS OF AGENCY RULEMAKING DECISIONS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 70-2-23 NMSA 1978 (being Laws 1935, Chapter 72, Section 15, as amended) is amended to read:

"70-2-23. HEARINGS ON RULES, REGULATIONS AND ORDERS-- NOTICE--EMERGENCY RULES.--

A. Except as provided for ~~herein~~ in this section, before any rule, regulation or order, including revocation, change, renewal or extension thereof, ~~shall be~~ is made under the provisions of ~~this~~ the Oil and Gas Act, a public hearing

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1 shall be held at such time, place and manner as may be  
2 prescribed by the oil conservation division of the energy,  
3 minerals and natural resources department. The division shall  
4 first give reasonable notice of [~~such~~] the hearing, in no case  
5 less than ten days, except in an emergency, and at any such  
6 hearing any person having an interest in the subject matter of  
7 the hearing [~~shall be~~] is entitled to be heard. In case an  
8 emergency is found to exist by the division, which in its  
9 judgment requires the making a rule, regulation or order  
10 without first having a hearing, [~~such~~] the emergency rule,  
11 regulation or order shall have the same validity as if a  
12 hearing with respect to [~~the same~~] it had been held after due  
13 notice. The emergency rule, regulation or order permitted by  
14 this section shall remain in force no longer than fifteen days  
15 from its effective date, and, in any event, it shall expire  
16 when the rule, regulation or order made after due notice and  
17 hearing with respect to the subject matter of [~~such~~] the  
18 emergency rule, regulation or order becomes effective.

19 B. No rule shall be adopted by the commission  
20 unless:

21 (1) the rule is supported by testimony from  
22 acknowledged scientific experts who have been found by the  
23 commission to qualify as expert witnesses;

24 (2) scientific facts, rather than conjecture,  
25 have been presented by the experts to the commission from which

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1 the commission can logically conclude that property or  
2 pecuniary damages will be avoided or mitigated if the rule is  
3 adopted; and

4 (3) the commission states, in writing, the  
5 specific scientific testimony that supports the rule and the  
6 scientific facts from which the commission has concluded that  
7 property or pecuniary damages will be avoided or mitigated by  
8 the rule."

9 Section 2. Section 70-2-25 NMSA 1978 (being Laws 1935,  
10 Chapter 72, Section 17, as amended) is amended to read:

11 "70-2-25. REHEARINGS--APPEALS.--

12 A. Within twenty days after entry of an order or  
13 decision of the commission, a party of record adversely  
14 affected may file with the commission an application for  
15 rehearing in respect of any matter determined by the order or  
16 decision, setting forth the respect in which the order or  
17 decision is believed to be erroneous. The commission shall  
18 grant or refuse the application in whole or in part within ten  
19 days after the application is filed, and failure to act on the  
20 application within that period shall be deemed a refusal and  
21 final disposition of that application. In the event the  
22 rehearing is granted, the commission may enter a new order or  
23 decision after rehearing as may be required under the  
24 circumstances.

25 B. A party of record to the rehearing proceeding

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1 dissatisfied with the disposition of the application for  
2 rehearing may appeal to the district court pursuant to the  
3 provisions of Section 39-3-1.1 NMSA 1978 except that the  
4 district court may set aside, reverse or remand a final  
5 decision to adopt a rule if it determines that:

6 (1) the agency acted fraudulently, arbitrarily  
7 or capriciously;

8 (2) the final decision was not supported by  
9 the specific scientific testimony relied upon by the  
10 commission;

11 (3) the scientific facts cited by the  
12 commission do not support the conclusion that property or  
13 pecuniary damages will be avoided or mitigated by the rule;

14 (4) the final decision was not otherwise  
15 supported by substantial evidence; or

16 (5) the agency did not act in accordance with  
17 law."

18 Section 3. Section 74-1-9 NMSA 1978 (being Laws 1971,  
19 Chapter 277, Section 13, as amended) is amended to read:

20 "74-1-9. ADOPTION OF REGULATIONS--NOTICE AND HEARING--  
21 APPEAL.--

22 A. Any person may recommend or propose regulations  
23 to the board for promulgation. The board shall determine  
24 whether [~~or not~~] to hold a hearing within sixty days of  
25 submission of a proposed regulation.

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1           B. No regulation shall be adopted until after a  
2 public hearing by the board. As used in this section,  
3 "regulation" includes any amendment or repeal thereof.  
4 Hearings on regulations of nonstatewide application shall be  
5 held within ~~[that]~~ the area ~~[which]~~ that is substantially  
6 affected by the regulation. Hearings on regulations of  
7 statewide application may be held at Santa Fe or within any  
8 area of the state substantially affected by the regulation. In  
9 making its regulations, the board shall ~~[give the weight it~~  
10 ~~deems appropriate to all relevant facts and circumstances~~  
11 ~~presented at the public hearing, including but not limited to:~~

12                   ~~(1) character and degree of injury to or~~  
13 ~~interference with health, welfare, animal and plant life,~~  
14 ~~property and the environment;~~

15                   ~~(2) the public interest, including the social,~~  
16 ~~economic and cultural value of the regulated activity and the~~  
17 ~~social, economic and cultural effects of environmental~~  
18 ~~degradation; and~~

19                   ~~(3) technical practicability, necessity for~~  
20 ~~and economic reasonableness of reducing, eliminating or~~  
21 ~~otherwise taking action with respect to environmental~~  
22 ~~degradation] comply with the requirements of Subsection F of~~  
23 this section.

24           C. The standards for regulations set forth in  
25 Subsection A of this section do not apply to the promulgation

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1 of regulations under the Air Quality Control Act or any other  
2 act in which specific standards are set forth for the board's  
3 consideration.

4 D. Notice of the hearing shall be given at least  
5 sixty days prior to the hearing date and shall state the  
6 subject, the time and the place of the hearing and the manner  
7 in which interested persons may present their views. The  
8 proposed language amending any existing regulation or any  
9 proposed new regulation shall be made available to the public  
10 as of the date the notice of the hearing is given. The notice  
11 shall also state where interested persons may secure copies of  
12 any proposed amendment or new regulation. The notice shall be  
13 published in a newspaper of general circulation in the area  
14 affected. Reasonable effort shall be made to give notice to  
15 all persons who have made a written request to the board for  
16 advance notice of hearings.

17 E. At the hearing, the board shall allow all  
18 interested persons reasonable opportunity to submit data,  
19 proposed changes to the proposed regulation, views or arguments  
20 orally or in writing and to examine witnesses testifying at the  
21 hearing. Any person heard or represented at the hearing shall  
22 be given written notice of the action of the board.

23 F. No regulation shall be adopted by the board  
24 unless:

25 (1) the regulation is supported by testimony

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1 from acknowledged scientific experts who have been found by the  
2 board to qualify as expert witnesses;

3 (2) scientific facts, rather than conjecture,  
4 have been presented by the experts to the board from which the  
5 board can logically conclude that property or pecuniary damages  
6 will be avoided or mitigated if the regulation is adopted; and

7 (3) the board states, in writing, the specific  
8 scientific testimony that supports the regulation and the  
9 scientific facts from which the board has concluded that  
10 property or pecuniary damages will be avoided or mitigated by  
11 the regulation.

12 [~~F.~~] G. The board may designate a hearing officer  
13 to take evidence in the hearing. A transcript shall be made of  
14 the entire hearing proceedings.

15 [~~G.~~] H. No regulation or amendment or repeal  
16 thereof adopted by the board shall become effective until  
17 thirty days after its filing under the State Rules Act.

18 [~~H.~~] I. Any person who is or may be affected by a  
19 regulation adopted by the board may appeal to the court of  
20 appeals for further relief. All such appeals shall be upon the  
21 transcript made at the hearing and shall be taken to the court  
22 of appeals within thirty days after filing of the regulation  
23 under the State Rules Act.

24 [~~I.~~] J. The procedure for perfecting an appeal to  
25 the court of appeals under this section consists of the timely

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1 filing of a notice of appeal with a copy attached to the  
2 regulation from which the appeal is taken. The appellant shall  
3 certify in his notice of appeal that arrangements have been  
4 made with the board for preparation of a sufficient number of  
5 transcripts of the record of the hearing on which the appeal  
6 depends to support his appeal to the court, at the expense of  
7 the appellant, including three copies [~~which~~] that he shall  
8 furnish to the board.

9 [~~J-~~] K. Upon appeal, the court of appeals shall set  
10 aside the regulation only if [~~found to be~~]:

11 (1) found to be arbitrary, capricious or an  
12 abuse of discretion;

13 (2) the final decision was not supported by  
14 the specific scientific testimony relied upon by the board;

15 (3) the scientific facts cited by the board do  
16 not support the conclusion that property or pecuniary damages  
17 will be avoided or mitigated by the regulation;

18 (4) found to be not otherwise supported by  
19 substantial evidence in the transcript; or

20 [~~(3)~~] (5) found to be otherwise not in  
21 accordance with law."

22 Section 4. Section 74-6-6 NMSA 1978 (being Laws 1967,  
23 Chapter 190, Section 5, as amended) is amended to read:

24 "74-6-6. ADOPTION OF REGULATIONS AND STANDARDS--NOTICE  
25 AND HEARING.--

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1           A. No regulation or water quality standard or  
2 amendment or repeal thereof shall be adopted until after a  
3 public hearing.

4           B. Any person may petition in writing to have the  
5 commission adopt, amend or repeal a regulation or water quality  
6 standard. The commission shall determine whether to hold a  
7 hearing within ninety days of submission of the petition. The  
8 denial of such a petition shall not be subject to judicial  
9 review.

10           C. Hearings on regulations or water quality  
11 standards of statewide application shall be held in Santa Fe.  
12 Hearings on regulations or standards that are not of statewide  
13 application may be held within the area that is substantially  
14 affected by the regulation or standard. At least thirty days  
15 prior to the hearing date, notice of the hearing shall be  
16 published in the New Mexico register and a newspaper of general  
17 circulation in the area affected and mailed to all persons who  
18 have made a written request to the commission for advance  
19 notice of hearings and who have provided the commission with a  
20 mailing address. The notice shall state the subject, the time  
21 and the place of the hearing and the manner in which interested  
22 persons may present their views. The notice shall also state  
23 where interested persons may secure copies of any proposed  
24 regulation or water quality standard.

25           D. At the hearing, the commission shall allow all

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1 interested persons reasonable opportunity to submit data, views  
2 or arguments orally or in writing and to examine witnesses  
3 testifying at the hearing. The commission may designate a  
4 hearing officer to take evidence in the hearing. Any person  
5 heard or represented at the hearing shall be given written  
6 notice of the action of the commission.

7 E. No regulation shall be adopted by the commission  
8 unless:

9 (1) the regulation is supported by testimony  
10 from acknowledged scientific experts who have been found by the  
11 commission to qualify as expert witnesses;

12 (2) scientific facts, rather than conjecture,  
13 have been presented by the experts to the commission from which  
14 the commission can logically conclude that property or  
15 pecuniary damages will be avoided or mitigated if the  
16 regulation is adopted; and

17 (3) the commission states, in writing, the  
18 specific scientific testimony that supports the regulation and  
19 the scientific facts from which the commission has concluded  
20 that property or pecuniary damages will be avoided or mitigated  
21 by the regulation.

22 [~~E.~~] F. No regulation or water quality standard or  
23 amendment or repeal thereof adopted by the commission shall  
24 become effective until thirty days after its filing in  
25 accordance with the provisions of the State Rules Act."

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1 Section 5. Section 74-6-7 NMSA 1978 (being Laws 1967,  
2 Chapter 190, Section 6, as amended) is amended to read:

3 "74-6-7. ADMINISTRATIVE ACTION--JUDICIAL REVIEW.--

4 A. Except as otherwise provided in the Water  
5 Quality Act, a person who is adversely affected by a regulation  
6 adopted by the commission or by a compliance order approved by  
7 the commission or who participated in a permitting action or  
8 appeal of a certification before the commission and who is  
9 adversely affected by such action may appeal to the court of  
10 appeals for further relief. All such appeals shall be upon the  
11 record made before the commission and shall be taken to the  
12 court of appeals within thirty days after the regulation,  
13 compliance order, permitting action or certification that is  
14 being appealed occurred. If an appeal of a regulation is made,  
15 [~~then~~] the date of the commission's action shall be the date of  
16 the filing of the regulation under the State Rules Act.

17 B. Upon appeal, the court of appeals shall set  
18 aside the commission's action only if [~~it is found to be~~]:

19 (1) found to be arbitrary, capricious or an  
20 abuse of discretion;

21 (2) the commission decision to adopt a  
22 regulation was not supported by the specific scientific  
23 testimony relied upon by the commission;

24 (3) the scientific facts cited by the  
25 commission in the adoption of a regulation do not support the

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1 conclusion that property or pecuniary damages will be avoided  
2 or mitigated by the regulation;

3 (4) found to be not otherwise supported by  
4 substantial evidence in the record; or

5 [~~3~~] (5) otherwise not in accordance with  
6 law.

7 C. After a hearing and a showing of good cause by  
8 the appellant, a stay of the action being appealed may be  
9 granted pending the outcome of the judicial review. The stay  
10 of the action may be granted by the commission or by the court  
11 of appeals if the commission denies a stay within ninety days  
12 after receipt of the application."

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